

United States District Court, S.D. New York.  
UNITED STATES OF AMERICA, Plaintiff,

v.

AN ORIGINAL MANUSCRIPT DATED NOVEMBER 19, 1778 Bearing the  
Signature of Junipero Serra, Located at Sotheby's, 1334 York Avenue, New York,  
New York, Defendant-in-rem.

No. 96 Civ. 6221(LAP).

Feb. 22, 1999.

## Opinion

### **MEMORANDUM AND ORDER**

PRESKA, J.

Plaintiff United States of America (the "Government" or "Plaintiff") brings this action pursuant to 19 U.S.C. § 2609, 19 U.S.C. § 1595a(c), 18 U.S.C. § 545 and 18 U.S.C. § 981(a)(1)(C) against Claimant Dana Toft ("Claimant" or "Toft") seeking the forfeiture of all right, title and interest in personal property described as an original manuscript dated November 19, 1778 bearing the signature of Junipero Serra, located at Sotheby's, 1334 York Avenue, New York, New York (the "Manuscript"). Plaintiff now moves for summary judgment on its claim for forfeiture of the defendant-in-rem property under the Cultural Property Implementation Act, 19 U.S.C. § 2609. For the reasons that follow, the motion is granted.

### **BACKGROUND**

Viewed in the light most favorable to Claimant, the background facts are discussed herein.<sup>2</sup> As early as 1956, the Manuscript was reported by at least one scholarly authority, Antonine Tibesar, to be contained in Volume II, Folio 365, of the "Californias" collection at the Mexican National Archives in Mexico City. (Pl.3(g) Statement ¶ 1). The Manuscript also appeared in microfilm records made by the Archives on or about September 19, 1993. (*Id.*) In early 1992, Duane Douglas ("Douglas"), a Mexico City book, coin and manuscript dealer, (Toft's 56.1 Statement ¶ 3), acquired the Manuscript (and other historical documents) at a Mexico City flea market for \$300 to \$400 cash. (Pl.3(g) Statement ¶¶ 2, 3). Douglas did not inquire of the Manuscript's provenance. (*Id.* ¶ 3). In or about 1993, Douglas brought the Manuscript to Los Angeles, without declaring it to Customs authorities, and kept the Manuscript in a safe in his daughter's home in Los Angeles with the hope of eventually selling it. (*Id.* ¶¶ 4, 5). In 1995, Douglas was introduced to Toft by a Chicago client named Michael Johnson ("Johnson"). (*Id.* ¶ 6). Toft claims that his entry into the area of valuable documents was a "very recent venture" and that he relied on representations by Johnson that he had faith and confidence in Douglas. (Toft's 56.1 Statement ¶¶ 4, 5).

On or about March 27, 1996 Douglas retrieved the Manuscript from his daughter's house and brought it to Chicago where he met Johnson and Toft in a hotel room. (Pl.3(g) Statement ¶¶ 7, 8). Toft claims that when he met Douglas to view the Manuscript, he inquired of Douglas how he obtained it and where it came from. (Toft's 56.1 Statement ¶ 7). Toft also claims that Douglas made representations concerning the Manuscript's history. (*Id.* ¶ 8). Douglas alleges that he told Toft that he acquired the Manuscript when the Sanchez–Flores collection was dispersed in the early 1970s and that he later sold the Manuscript to another person but eventually re-acquired it. (Pl.3(g) Statement ¶ 9). According to Toft, Douglas never claimed or mentioned that it had ever been in the National Archives. Toft states he specifically asked Douglas if he owned the Manuscript and was able to sell it, and Douglas answered in the affirmative. (*Id.* ¶¶ 9, 10).

Toft agreed to purchase the Manuscript from Douglas for \$16,000 cash, (Pl.3(g) Statement ¶ 10; Toft's 56.1 Statement ¶ 11), after Douglas's willingness to issue a written bill of sale convinced Toft that “it was a righteous deal.” (Toft's 56.1 Statement ¶ 11). The following day, the bill of sale was drafted by Toft's attorney, Jeffrey S. Blumenthal, incorporating the terms of the transaction which provided that the Manuscript “was part of the Sanchez–Flores collection between 1925 and 1972 at which time it was disbursed.” (Claimant Mem. at 5–6, Ex. 3).

In June 1996, Toft consigned the Manuscript to Sotheby's for auction at an estimated price range of \$20,000 to \$30,000. (Pl.3(g) Statement ¶ 14). The Manuscript did not meet the minimum bid at auction, but Toft left it on consignment for a possible non-auction sale. Toft declined an offer of \$17,000 to purchase the Manuscript. (*Id.* ¶ 15).

On June 11, 1996, Bryan Nerone (“Nerone”), a Los Angeles dealer in rare manuscripts, faxed a letter to Patricia Galeana, the General Director of the Mexican National Archives, stating that he had an opportunity to purchase the Manuscript, and that while researching its history, he had become aware that “perhaps this manuscript was once the property of the national archives of Mexico.” (*Id.* ¶ 16). Toft disputes the Government's assertion that Nerone is a “dealer and appraiser in original autographed letters, rare manuscripts, documents and fine prints” but alleges that Nerone is not listed as a dealer in the Los Angeles area or in the yellow or white pages and seems to be unknown to other local dealers of that type of merchandise. (Toft's 56.1 Statement ¶ 2).

Following Nerone's letter, the Archives began an investigation and determined that the Manuscript had been removed from the bound “Californias” Volume II, Part One, Page 365, where it had previously been microfilmed as part of the Archives' collection. (Pl.3(g) Statement ¶ 17). By letter dated June 18, 1996, the Mexican National Archives asserted a claim to the Manuscript and requested its return. (*Id.* ¶ 18). On July 3, 1996, Sotheby's informed Toft's counsel that it intended to retain the Manuscript pending resolution of the claim. (*Id.* ¶ 19). The Government alleges that the Manuscript remains in Sotheby's custody, (Compl.¶ 10), but Toft claims that Sotheby's relinquished possession of the item to the United States Customs Department in accordance with the warrant served upon it. (Toft's 56.1 Statement ¶ 13).

On July 22, 1996, Toft filed an injunctive action against Sotheby's in Cook County Circuit Court seeking return of the Manuscript. (Pl.3(g) Statement ¶ 20). On or about July 24, 1996, the Mexican government submitted a request to the United States government seeking assistance in recovering the Manuscript. (Pl.3(g) Statement ¶ 21).

Toft claims that Mexico has never initiated any formal judicial proceedings at the request of the United States for the purpose of seizing an item of stolen cultural property in the possession of a Mexican citizen. Furthermore, he alleges that under Article 133 of the Mexican Constitution, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, ratified by Mexico on or about April 1, 1973, is considered the law of Mexico and requires no further enabling legislation in order to take effect. (Toft's 56.1 Statement ¶¶ 14, 15).

## DISCUSSION

### I. *UNESCO Convention and the CPIA*

The United States has both acceded to international agreements and enacted its own statutes regarding the importation of cultural property. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 295 (7th Cir.1990). One of the more significant international agreements is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Transport, Export and Transfer of Ownership of Cultural Property (the "Convention"). This agreement focuses on private conduct, primarily during peacetime. The Convention, although ratified by Congress in 1972, was not formally implemented in the United States until the enactment of the Cultural Property Implementation Act ("CPIA") in 1983. This Act, 19 U.S.C. §§ 2601–2613, focuses primarily on implementation of Articles 7(b) and 9 of the UNESCO Convention, which call for concerted action among nations to prevent trade in specific items of cultural property in emergency situations. The CPIA addresses primarily the question of import controls and grants authority to the United States government to seize the stolen property. *Id.* at 296–97. This Act provides in relevant part that:

Any designated archaeological or ethnological material or article of cultural property, as the case may be, which is imported into the United States in violation of the section 2606 of this title or section 2607 of this title shall be subject to seizure and forfeiture.

19 U.S.C. § 2609(a). This statute works in conjunction with section 2607 which provides that:  
No article of cultural property<sup>3</sup> documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into

force of the Convention for the State Party, whichever date is later, may be imported into the United States.

19 U.S.C. § 2607.

## **II. Evidentiary Requirements**

The statute governing the evidentiary requirements of the CPIA states that:

Notwithstanding the provisions of section 1615 of this title, in any forfeiture proceeding brought under this chapter in which the material or article, as the case may be, is claimed by any person, the United States shall establish—

...

(2) in the case of any article subject to section 2607 of this title, that the article—

(A) is documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in a State Party, and

B) was stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party concerned, whichever date is later.

19 U.S.C. § 2610. Claimant argues that the first sentence of this section, which reads “notwithstanding the provisions of section 1615 of this title”, removes from the CPIA the burden of proof normally applied in forfeiture cases, rising to the level of probable cause.<sup>4</sup> Because of this sentence, Claimant argues that “the government must do something more” to establish its case. (Claimant Mem. at 5). Toft's notion of “something more” is the higher burden of preponderance of the

Claimant also advances this argument as it applies to the use of hearsay evidence. While under normal circumstances evidence which is inadmissible at trial may not be relied upon in deciding a motion for summary judgment, this rule is abandoned in a forfeiture proceeding. *See, e.g., United States v. One Parcel of Property Located at 15 Black Ledge Drive, Marlborough, Conn.*, 897 F.2d 97, 101 (2d Cir.1990). Toft claims this, too, was not envisioned as part of the CPIA and is expressly excluded by virtue of the first sentence of section 2610. Furthermore, Claimant maintains that because Congress incorporated procedures of the Customs Act, 19 U.S.C. section 1615, when establishing the drug forfeiture procedure in section 881(d), the sentence distinguishing section 1615 also applies with full force to preclude reliance on section 881(d) procedures as well.

I begin my analysis with a close reading of the text of 19 U.S.C. section 2610. I find that on its face the statute does not suggest that the burden of proof changes but, instead, that the United States, and not the claimant, holds the initial burden. Because this reading may be subject to some interpretation, and because there has not been a single decision on a forfeiture brought under the provisions of the CPIA, I turn to the legislative history to determine Congress's intent.

A careful reading of the legislative history of section 2610 leaves no doubt that Congress did not intend to exclude the more lax evidentiary standards with respect to the burden of proof and the hearsay evidence but, rather, intended to distinguish section 1615 to clarify that in a CPIA forfeiture, the burden of proof lies upon the government, not the claimant. (See Pl. Mem. at 3; Claimant Mem. at 3–5). Congress specifies in the legislative history that:

Notwithstanding section 615 of the Tariff Act of 1930 [19 U.S.C. § 1615], *the burden of proof will be on the United States* in such proceedings to establish that material subject to section 207 has been designated by the secretary of the treasury under section 205 as covered by an agreement with a state party or by an emergency action. In the case of an article of cultural property, the United States must established [sic] that the article appertains to the inventory of a museum or similar institution in a state party and was stolen from the institution after the effective date of this Act or after the date the convention entered into force for the state party concerned, whichever is later.

P.L. 97–446, 1982 U.S.C.C.A.N. 4110 (emphasis added). There is no evidence that Congress ever intended to increase the quantum of proof necessary to justify seizure and forfeiture. Thus, I find that in distinguishing a section 2610 forfeiture from the normal Customs procedures under 1615, Congress plainly directs the court to treat a CPIA forfeiture as any other forfeiture except that the burden of proof is initially on the government, not on the claimant.

#### **A. Probable Cause Legal Standard**

To establish a prima facie case for forfeiture, the government need only demonstrate probable cause. See *United States v. One 1986 Mercedes Benz*, 846 F.2d 2, 4 (2d Cir.1986). “Since probable cause is all the government need show to establish its prima facie case at the forfeiture proceeding, it should be sufficient to use whatever evidence traditionally establishes probable cause, for the purpose of summary judgment.” *United States v. The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1267 (2d Cir.1989). The Court of Appeals has recognized an exception to the requirements of Rule 56(e) that supporting and opposing affidavits be based upon personal knowledge and admissible evidence, allowing the government to establish probable cause on the basis of hearsay affidavits. See *One Parcel of Property*, 897 F.2d at 101; *Livonia Road*, 889 F.2d at 1267; *United States v. 316 Units of Mun. Securities*, 725 F.Supp. 172, 177, n. 4 (S.D.N.Y.1989). “The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence.” *One Parcel of Property*, 897 F.2d at 102 (quoting *United States v. One 56–Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1283 (9th Cir.1983)).

Once the government establishes probable cause for forfeiture, the burden of proof then shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture, or to establish any applicable affirmative defense. *Banco Cafetero Panama*, 797 F.2d at 1162; *United States v. \$2,500 in U.S. Currency*, 689 F.2d 10, 12 (2d Cir.1982), cert. denied, 465 U.S. 1099 (1984); *United States v. All Right, Title and Interest in Real Property and Appurtenances*

*There to Known as 785 St. Nicholas Ave.*, 983 F.2d 396 (2d Cir.), *cert. denied*, 113 S.Ct. 2349 (1993); *United States v. \$23,668 in U.S. Currency*, 864 F.Supp. 317, 321 (W.D.N.Y.1994); 19 U.S.C. § 1615. Summary judgment for the government should be granted on a showing of probable cause that is un rebutted by an applicable defense, such as an innocent owner defense. See *Livonia Road*, 889 F.2d at 1268. To sustain the burden of showing existence of material fact on an innocent owner defense, a claimant must offer evidence admissible at trial as to lack of knowledge and consent. See, e.g., *United States v. Parcel of Land (18 Oakwood Street)*, 958 F.2d 1 (1st Cir.1992).

## **B. Factual Basis for Forfeiture**

As stated above, the provisions authorizing forfeiture of cultural property are found in sections 2609 and 2607 of Title 19 of the United States Code. While the government's proof must rise merely to a level above mere suspicion, *Banco Cafetero Panama*, 797 F.2d at 1160, it must be legally sufficient and reliable. See *One Parcel of Property*, 897 F.2d at 102. In addition, "circumstantial evidence and inferences therefrom can suffice to support a finding a probable cause." *United States v. Four Million Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 904 (11th Cir.1985).

Section 2607 requires that there be sufficient evidence that the Manuscript is "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution." 19 U.S.C. § 2607. The Government offers sufficient evidence that the Manuscript belongs to the National Archives of Mexico. First, Antonine Tibesar identifies the original Manuscript as being found at the "Archivo General de la Nacion, Mexico. Seccion Californias, tomo 2 (primera parte), fol. 365." (Barr Decl., Ex. 1). Second, the Manuscript appears in the Archives' 1993 microfilm inventory. (Pl. Mem. at 12). Third, Bryan Nerone, a dealer of rare manuscripts in Los Angeles, states that he saw the Manuscript in a Sotheby's catalog in 1996 and became suspicious after comparing it to the one described in Tibesar's scholarly work on Serra.<sup>5</sup> (Talbert Decl. ¶¶ 3–7).

Section 2607 also states the government must prove that the article was "stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever is later...." 19 U.S.C. § 2607. In this case, the effective date of the Act was ninety days after January 12, 1983, and the Convention was ratified by Mexico on or about April 1, 1973. Thus, the government must prove that the Manuscript was stolen after the later date, approximately April 12, 1983. Here, the statement of Lic. Alfredo Salgado Loyo establishes at a minimum that (1) a matching description of the Serra Manuscript was contained in the Mexican National Archives' microfilm records as of September 1993, at Page 365, Vol. Two (Part I) of the California collection; and (2) that Page 365 of Vol. Two (Part I) of the Californias collection, where the Manuscript should appear, is now missing. The implication that may be drawn is that the Serra Manuscript belonged to the collection of the Archives and has since been stolen after 1983. (Pl. Reply Br. at 5). Furthermore, Special Agent Bonnie Goldblatt, an art fraud specialist with the United States Customs Service, concludes that based upon her examination of the microfilm record and the defendant-in-rem Manuscript, the Manuscript is the same document which is depicted in the microfilm record from the Mexican National Archives. (Goldblatt Decl. ¶ 4). Accordingly, I find that the Government has met its burden of establishing that there is probable cause to believe that the

seized defendant-in-rem Manuscript is the same one which has been reported stolen from the Mexican National Archives.

### **C. Innocent Owner Defense**

Because I find that the Government has made its probable cause showing, the onus now lies on the claimant to establish by a preponderance of the evidence that “the factual predicates for forfeiture have not been met.” *Banco Cafetero Panama*, 797 F.2d at 1160. Toft claims that he is an innocent purchaser and asserts that “the Government essentially concedes as much.” (Claimant Mem. at 12). Toft's assessment of the Government's argument is mistaken. While the Government assumes, *arguendo*, that Toft was an innocent purchaser for sake of the compensation argument (addressed below), in no way does the Government concede this affirmative defense. Toft carries the burden of such a defense, *See One Parcel of Property*, 985 F.2d at 72, and I find that he has not met his burden.

The facts clearly show that Toft was willfully blind to the suspicious nature of the Manuscript transaction. *See United States v. All Funds Presently on Deposit*, 832 F.Supp. 542, 564 (S.D.N.Y.1993) (claimant must establish he was not willfully blind to illegal activity in order to maintain an innocent owner defense). Toft claims that his entry into the area of valuable documents was a “very recent venture,” (Toft's 56.1 Statement ¶ 4), yet Toft did not question meeting in a hotel room and exchanging \$16,000 cash for the Manuscript. Furthermore, Toft claims he was given “representations” of the Manuscript's authenticity and felt it was a “righteous deal” based upon Douglas's willingness to enter into a bill of sale, yet Toft does not state that he was provided with any documentation supporting these “representations.” (Toft's 56.1 Statement ¶ 11). Toft also does not state that he inquired any further into how the Manuscript came to be in Douglas's possession other than to ask Douglas if he “owned the Manuscript and was able to sell it.” (Toft's 56.1 Statement ¶ 10). I find that Douglas's actions, his lack of documentation of the history of the Manuscript and his failure to inquire into the provenance of the Manuscript is highly suspicious and Toft cannot claim to be an innocent owner under such circumstances. Therefore, contrary to Claimant's Memorandum, I do not find that “given Toft's conduct” (Claimant Mem. at 12) he has established by a preponderance of the evidence that he is an innocent owner and entitled to that affirmative defense.

### **III. No Compensation for Claimant**

Section 2609 provides for compensation of claimants who can establish they hold good title or are innocent purchasers. The relevant portion states that:

In any action for forfeiture under this section regarding an article of cultural property imported into the United States in violation of section 2607 of this title, if the claimant establishes valid title to the article, under applicable law, as against the institution from which the article was stolen, forfeiture shall not be decreed unless the State Party to which the article is to be returned pays the claimant just compensation for the article. In any action for forfeiture under this section where the claimant does not establish such title but establishes that it purchased the article for value without knowledge or reason to believe it was stolen, forfeiture shall not

be decreed unless (A) the State Party to which the Article is to be returned pays the claimant an amount equal to the amount which the claimant paid for the article, or (B) the United States establishes that such State Party, as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from an institution in the United States without requiring payment of compensation.

19 U.S.C. § 2609(c)(1).

Toft argues that Mexico's ratification of the Convention in 1973 precludes the need for any enabling legislation in order to take effect. Thus, Toft concludes that according to Article 7(b)(ii) of the Convention, the United States must reimburse Toft under the theory of reciprocity.<sup>6</sup> This argument is flawed because it neglects the relevant portion of Article 7(a) of the Convention which provides that

The statement of Agustin M. De Pavia Iturralde, the General Director of Litigation and Advice in the Office of the Attorney General of the Republic of Mexico details Mexico's "national legislation" under similar circumstances. (Barr.Decl., Ex. 9). According to the Iturralde Statement, the Federal Public prosecutor in Mexico has the power to seize assets which are the object, instrumentality or proceeds of a crime, upon the terms of Articles 40 and 41 of the Criminal Code for the Federal District in Local Matters and for all of the Republic in Federal Matters. (Iturralde Statement at 1). If the individual can prove in good faith the ownership of the asset seized within a period of six months from the day of notification of the seizure, the asset will be returned. Otherwise, pursuant to Article 2119 and other articles of the Mexican Civil Code, a good faith purchaser of a seized asset only has a civil cause of action against the person who sold him the property. (*Id.* at 2). The statement concludes:

I do manifest that in principle and in similar cases, the United States authorities would be able to recover a document stolen from a General Archives of that country, without requesting from your country the payment of damages and injuries caused to a Mexican citizen who would have purchased it in good faith, and even less so in those cases where the purchase was made in bad faith.

(*Id.*). Claimant argues that more evidence is needed to support the conclusion that under Mexican law stolen cultural property would be returned absent reimbursement of that individual.

Because the statute is silent as to the type of evidence sufficient to document the law at issue, I turn to the legislative history of the CPIA for guidance. It is there that I find that "[i]t is considered that reciprocity would have to be shown by a Government decree, proclamation, written commitment, written opinion, or other such evidence." P.L. 97-446, 1982 U.S.C.C.A.N. 4110. Accordingly, I find that the Iturralde Statement is sufficient under the statute to prove that Mexico "would in similar circumstances recover and return an article stolen from an institution in the United States without requiring payment of compensation." 19 U.S.C. § 2609(c)(1). I note that even if I disregarded the

Iturralde Statement as insufficient, because I find that Toft was not an innocent purchaser, he would not receive compensation under Part (A) of section 2609(c)(1) as well.

### **CONCLUSION**

For the reasons stated above, the Government's motion for summary judgment is granted. The Government shall present a proposed judgment on two days notice.

SO ORDERED: